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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE, and HOLLIS L. SEARCY - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

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COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - *Petitioner*

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES MCCLAIN, FAYE MANION, SHELBY MANION, ROSE ELLA MCCLAIN, JACK M. LOWERY, JR., DANIEL B. BOONE and HOLLIS L. SEARCY - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

RESPONDENTS' STATEMENT OF THE FACTS

As the District Court found, this is a unique case upon its facts. On the evening of November 7, 1979, Clyde Daniel Graham became a suspect in the killing of State Trooper, Eddie Harris.[1] Immediately thereafter, the most intensive manhunt in the recent history of the Commonwealth of Kentucky ensued. It was

[1]Almost a month to the day thereafter, Clyde Daniel Graham was shot and killed by a Kentucky State Trooper at a motel in Effingham, Illinois. Clyde's death was the subject of a separate 1983 action filed in the United States District Court and was settled on the third day of trial.

during the course of this manhunt that the constitutional violations inflicted upon the Respondents occurred.[2]

There are at least two extraordinary aspects of this case. First, it can be accurately said that a substantial number of Kentucky State Police Troopers turned from their constitutional role as peace officers into an unruly, uncontrolled mob. The second and most extraordinary feature of all, however, was the direct personal presence and involvement of State Police Commissioner, Kenneth Brandenburgh, a policy making official, who was the highest ranking state law enforcement officer of the Commonwealth of Kentucky.[3]

It should be noted that the Petitioner adopts an intentionally ambiguous posture in regard to the involvement of Commissioner Brandenburgh. They have suggested, at various times and places, that Commissioner Brandenburgh was not present and not directly involved. On the other hand, at page 7 of its Statement of the Case, even the Petitioner concedes that Brandenburgh and his men were guilty of the use

[2]The evidence is overwhelming that the Respondents were subjected to two illegal searches, excessive force which required hospitalization, invasion of privacy, malicious prosecution and abuse of process.

[3]KRS 16.080, enacted by the legislature of Kentucky in 1976, provides in part as follows:

> "The Commissioner shall adopt, formulate, alter and repeal rules and regulations for the enlistment, training, discipline and conduct of officers of the bureau, and he may make any other rules and regulations for the governing and operation of the bureau as appear to him reasonably necessary to carry out the provisions of KRS 16.010 to 16.170."

of "excessive force" and "the officers acted in an unprofessional manner."

Any doubt of this concession by the Petitioner is removed by the following language set out at page 7 of its brief,

> "As a consequence of the failure of these officers to observe state policy, the Commonwealth of Kentucky has never supported either the Kentucky State Police Troopers, who were named individually or Kenneth Brandenburgh in any manner . . . . The Commonwealth of Kentucky has not contributed to nor paid the costs of litigation for any of the troopers or for the Commissioner."[4]

So great was the public outcry concerning the conduct of Commissioner Brandenburgh and his men that eventually Brandenburgh was replaced and the Attorney General of Kentucky was directed by the Governor to conduct an independent investigation surrounding the November 7, 1979 beatings and the subsequent death of Clyde Daniel Graham. The conclusions of the Attorney General's investigation are referred to, in part, by the Petitioner. (See Pet. App. pp. 27a-28a). Those conclusions are as follows:

A. A lack of leadership which resulted in an excessive number of troopers at the Graham residence to participate in the search, which rapidly became uncontrolled."

[4]Commissioner Brandenburgh's actions or inactions "may fairly be said to represent official policy." *Monell* v. *New York City Department of Social Services*, 436 U. S. 658, 56 L. Ed 2d. 611, 98 S. Ct. 2018 (1978).

B. The use of excessive force against the Plaintiffs.

C. An "obvious lack of professionalism . . . and a complete breakdown of the discipline demanded."

The Petitioner omitted any reference to the following additional conclusions of the Attorney General (the complete conclusions are set out in Res. App. p. 21).[5]

A. The failure to institute an immediate internal investigation into the allegations of the use of excessive force was erroneous and contributed to the failure to resolve these allegations.

B. The existing procedures for investigating complaints against members of the Kentucky State Police were totally inadequate.

C. The investigation directed by Commissioner Brandenburgh was cursory and incomplete.

The District Court also found Brandenburgh was directly involved in the constitutional violations:

> "In the case at bar, it was the action of the highest ranking police officer of the Commonwealth coupled with the action of many officers of the Commonwealth . . . which brought about the violations of the Plaintiffs alleged in this lawsuit, and which resulted in the settlement . . . . He (Police Commissioner Brandenburgh) is obligated to pay the sum of $45,000.00 as the result of his actions which along with those of other defendants led to this lawsuit (See Pet. App. pp. 6a-7a).

[5]These conclusions, were admissible as evidence in the United States District Court proceedings pursuant to F. R. Evid. 803 (8).

As a result of the large number of troopers and state police officials involved or potentially involved, the Respondents were required to engage in exhaustive discovery procedures. Upon completion of discovery, the action was assigned for trial and a settlement was obtained by the Respondents on the second day. As a part of the settlement, the Respondents specifically reserved the right to petition for an award of attorney's fees against the Commonwealth of Kentucky.

It is difficult to follow the ambiguous narrative by the Petitioner on the question of attorney's fees. At page 7 of their Petition for Writ of Certiorari, they claim that the attorney's fee Order was entered ex-parte. In their brief on the merits at page 10, they claim the United States District awarded fees without holding a hearing. In both petitions, they assert that the Commonwealth "had no notice prior to the signing of this Order that attorney's fees were being sought."

The record demonstrates the Commonwealth had ample notice. First of all, the Plaintiffs' Complaint in paragraph 4(d) alleges (J.A. p. 4),

> "Pursuant to the provisions of 42 U.S.C. §1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney's fees incurred in this action."

Secondly, the Commonwealth of Kentucky actively participated in the action as a named defendant until the United States District Court dismissed it by interlocutory order dated November 26, 1980 (Pet. App. p. 14a).

Finally, page 23 of the Joint Appendix reveals that the Respondents gave notice to the Petitioner of their request for attorney's fees on July 13, 1982, and that the Commonwealth responded to this Motion on August 10, 1982. It was not until September 2, 1982, (Pet. App. p. 18a) that Judge Allen entered the Order granting the Respondents attorney's fees assessible against the Commonwealth, and assigned the matter for a hearing on the amount of attorney's fees.

The final Order setting out the amount of attorney's fees was not entered until after a full evidentiary hearing at which all of the parties were represented, granted leave to call witnesses, to cross examine adverse witnesses and to introduce such evidence as the parties considered appropriate.

Thereafter, in the exercise of its discretion, the District Court entered an attorney's fee award in favor of the Respondents to be paid by the Commonwealth of Kentucky. The painstaking care with which the District Court drafted its Findings of Fact, Conclusions of Law and Memorandum Opinion is clearly evident from the record (Pet. App. p. 3a). There is no issue raised as to the dollar amount of the fee award.

SUMMARY OF THE ARGUMENT

1. The 11th Amendment is not and never has been a bar to an award of attorney's fees and court costs assessible against a state when prevailing plaintiffs vindicate federally protected constitutional rights by obtaining either money damages or prospective relief against policy making state officials. The 11th

Amendment only precludes an award of retroactive damages against a sovereign state and attorney's fees are not damages.

2. Respondents and not the Petitioner were prevailing parties against the Commonwealth of Kentucky by obtaining a damage settlement against State Police Commissioner, Kenneth Brandenburgh, in his official capacity. The acts of Commissioner Brandenburgh represented state policy by virtue of his office and subjected Kentucky to an assessment of fees under 42 USC §1988. That the Commonwealth was dismissed by interlocutory order by the United States District Court does not render it a prevailing party because states may be ordered to pay attorney's fees as a result of the acts of its policy making officials, whether named as a party or not.

3. The intent of Congress in enacting 42 USC §1988 was to encourage the vindication of federally protected constitutional rights and to authorize attorney's fee awards assessible against the states in any action whether at law or equity. This Court should not thwart such broad congressional intent by reversing the holding below.

ARGUMENT

I. While the 11th Amendment Precludes an Award of Damages on the Merits Against a Sovereign State, by Enacting 42 USC §1988, Congress Removed the 11th Amendment as a Bar to an Award of Attorney's Fees and Court Costs Assessable Against a State in Cases Such as This One, in Which Prevailing Plaintiffs Vindicate Federally Protected Constitutional Rights by Obtaining Either Money Damages or Prospective Relief Against Policy Making State Officials.

The Petitioner's reliance upon the 11th Amendment as a bar to the award of attorney's fees assessable against a state is misplaced. This Court squarely addressed this issue in *Hutto* v. *Finney,* 437 U. S. 694 (1978),

> "As this Court made clear in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws."
>
> "HR Rep. No. 94-1558, p. 7 (1976). The Report adds in a footnote that: 'Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments'."
>
> "Costs have traditionally been awarded without regard for the States' 11th Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court."

> "In *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70, 72 L. Ed. 168, 48 S. Ct. 97, the state challenged this Court's award of costs, but we squarely rejected the State's claim of immunity."

Although, injunctive relief and not retroactive damages were sought in *Hutto,* the Supreme Court of the United States in that decision did not limit the abrogation of 11th Amendment immunity to cases of prospective relief only. In *Maher* v. *Gagne,* 448 U. S. 122, (1980), this Court reaffirmed the broad intent of Congress to remove the 11th Amendment as a bar against fee awards payable by the states.

> "In *Hutto,* we rejected the argument of the Attorney General in Arkansas that the general language of §1988 was insufficient to overcome a State's claim of immunity under the Eleventh Amendment, noting that 'the Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants . . . .'"
>
> "Moreover, even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a State. (sic) Congress was clearly acting within its power under §5 of the Fourteenth Amendment in removing that barrier. Under §5, Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claim falls within the category of 'appropriate' legislation. And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided . . . ."

> "As the Court of Appeals pointed out such a fee award 'furthers the Congressional goal of encouraging suits to *vindicate constitutional rights* . . . .'"
>
> "It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment." (emphasis added)

When *Hutto, supra* and *Maher, supra,* are considered side by side, certain principles emerge:

1. The Eleventh Amendment has never been a bar to the award of attorney's fees as costs payable by the states.

2. Even if the 11th Amendment were a bar to the award of attorney's fees against a state, that bar was destroyed by Congress when it enacted 42 USC §1988.

The Petitioner argues at page 17 of its brief that §1988 is extremely limited in its application. This Court is urged to declare that Congress only intended the award of attorney's fees against the states if prevailing plaintiffs were successful in obtaining *prospective* relief against policy making state officials.

This argument flies in the very teeth of the wording of the Act itself. The Act declares its application "in any action at law, suit in equity, or other proper proceeding for redress". §1988 does not provide a limited application to cases involving prospective relief. It broadly applies "in *any* action." Moreover, *Maher, supra,* at page 129 goes so far as to hold:

> "For purposes of the award of counsel fees, parties may be considered to have prevailed when

> they vindicate rights through a consent judgment or without formally obtaining relief."

Thus, even settlements without formal court orders qualify prevailing parties for fee awards under §1988 so long as constitutional rights are vindicated. It therefore seems self-evident that only one threshold or condition precedent exists for the award of attorney's fees. This condition precedent is simply that the plaintiff must vindicate federally protected constitutional rights.

It seems equally obvious that Congress intended the victims of constitutional violations to have at their disposal a full arsenal of legal remedies so that regardless of the form of the infringement, redress could be obtained. It can scarcely be debated:

> "In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974).

Similarly, in *Milwee* v. *Cavuoto,* 653 F. 2d 80 (2nd Cir. 1981), it was observed:

> "Moreover, an individual damage action to redress instances of police misconduct is often the only tool reasonably available to vindicate society's interest in insuring that those who enforce the law abide by it. (See authorities cited).
>
> "Certainly, the vindication of an individual's civil rights, in an action against a state trooper, inures to the benefit of all citizens."

In *Rheuark* v. *Shaw,* 447 F. Supp. 897 (1979), the Plaintiffs obtained damages against a state judge and his court reporter because of an unreasonable delay in the preparation of a trial transcript in which the Plaintiffs were earlier convicted of various criminal offenses. All injunctive relief was denied. In approving the award of attorney's fees, the Court held:

> "By enacting 42 USC §1988, Congress intended to override the 11th Amendment immunity of the states and authorize fee awards payable by the states when their officials were sued in their official capacity."

In *Raney* v. *Jackson State College,* 551 F. 2d 672 (1977), the Plaintiff obtained neither injunctive relief nor money damages. His entire recovery was limited to a declaratory judgment that his First Amendment right of free speech had been denied by the officers and members of the Board of Trustees of the Institution of Higher Learning of Mississippi. Nonetheless, the Court approved the award of attorney's fees in favor of the Plaintiffs and against the State of Mississippi.

In most brutality cases, injunctive relief would be totally inappropriate. A classic example of this premise is presented by the case at bar. All of the injunctive relief in the world would not serve to vindicate the constitutional rights of the Respondents, who were subjected to the treatment set out in the facts of this case. Exactly the same can be said of the constitutional violations which occurred in *Brandon* v. *Holt,* 469 U. S. ____ (1985), a police brutality case in which

this Court recognized the applicability of 42 USC §1983.

II. For Purposes of Obtaining the Award of Attorney's Fees Pursuant to 42 U.S.C. §1988, the Plaintiffs Were Prevailing Parties Against the Commonwealth of Kentucky by Their Recovery of Money Damages Against the Commissioner of Kentucky State Police, an Official Whose Acts May Be Fairly Said to Represent State Policy.

At the outset, we freely acknowledge that the Commonwealth of Kentucky was named as a party defendant in the original Complaint. This course was followed not because of a lack of awareness of the 11th Amendment or of the Doctrine of Sovereign Immunity. We reasoned as follows:

1. By including the Commonwealth as a named party and serving them with Summons, all doubt was removed as to whether the Commonwealth had notice of the claim for attorney's fees being asserted by the Respondents.

2. Counsel for the Respondents were acutely aware of the oft repeated language declaring that a state could be answerable to prevailing plaintiffs for an assessment of attorney's fees and costs "whether or not the state was named as a party." This language suggested that an alternative existed.

3. Counsel for the Respondents were aware of the concurring opinion in *Hutto supra,* suggesting the possibility that the 11th Amendment proscription against naming states as defendants was in doubt.

It was thus concluded to make a record in the event it became appropriate to address the issue on appeal.[6]

Having stated the reasoning of counsel in naming the state as a party defendant we wish to address the Petitioner's contention that since the state was dismissed under these circumstances, it became a prevailing party against the Respondents. This argument ignores three fundamental and undisputed facts.

First, the Respondents never sought the recovery of retroactive damages on the merits from the Commonwealth. Paragraph 4(D)(J.A. p. 4) states the sole basis for including the Commonwealth as a named party:

> "Pursuant to the provisions of 42 USC Sec. 1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police is liable for the payment of reasonable attorney's fees incurred in this action."

Since the Respondents did not even seek money damages against the Commonwealth, it is obvious that the Commonwealth was not a prevailing party on the merits.

Second, it is obvious from the record that as to the only issue even pursued against the Commonwealth, i.e., the award of attorney's fees, the Respondents have succeeded.

Finally, the Petitioner overlooks the fact that the Commonwealth's liability for attorney's fees is not in

[6]Despite the foregoing, we do not take issue with the ruling of the District Court in entering its interlocutory order dismissing the Commonwealth as a named party. The voluntary settlement reached in this case eliminated any necessity for an appeal.

any way dependent upon whether or not they are named as a party. The Commonwealth's liability for attorney's fees arises from the fact that the Respondents sued a policy making official "in his official capacity" and prevailed by settlement.

In *Monell* v. *New York City Department of Social Services,* 436 U. S. at pp. 658, 690 N 55 (1978), this Court held that for purposes of evaluating the liability of New York City under §1983, the actions of the City's Department of Social Services were considered the actions of the City itself. That New York was not expressly named as a Defendant, did not prevent the action from being treated as one against the City.

In *Hutto, supra,* the State of Arkansas was not named as a Defendant. This Court nonetheless recognized that the State was subjected to payment of the fee award because the state officials had been sued in their official capacity.

Although, *Monell* and *Hutto* involved successful claims for prospective relief only, this Court has recognized that even damage suits against policy making governmental officials are tantamount to suits against the governmental entity whom the official represents. As recent as January 21, 1985, in *Brandon* v. *Holt, supra,* it was held,

> "In at least three recent cases under §1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents . . . . We now make that point explicit."

It thus can be seen that although the 11th Amendment shields a sovereign state from liability for money damages on the merits, the 11th Amendment has no application insofar as §1988 is concerned. Neither the Petitioner nor the Amici have submitted any legal authority to the contrary.

III. This Court Should not Thwart the Broad Remedial Intent of Congress to Encourage the Vindication of Constitutionally Protected Rights by Unduly Restricting the Application of 42 USC §1988 as Urged by the Petitioner.

Amici contend that because of the recent explosion of §1983 actions, this Court should relieve the states of any responsibility for the payment of attorney's fees and instead impose this responsibility upon individual defendants. It is intolerable, they claim, to place an "open-ended obligation upon the states to pay fees incurred in every constitutional damage suit between an employee and citizens." They even raise the grim specter of over compensation.[7]

[7]The claim of over compensation in this case for either the Respondents or their counsel is almost laughable. The ink had hardly dried on the Complaint when an indictment was returned against Buddy Graham in the United States District Court charging him with the offense of harboring his deceased son, Clyde. This resulted in a week's trial which had the effect of exhausting the limited resources of the Graham family.

Following the beatings on November 7, 1979, and almost as an afterthought, the Kentucky State Police charged the male Respondents with the offenses of disorderly conduct and resisting arrest. No effort was made to bring these charges to trial until after the §1983 action was filed. This criminal prosecution also resulted in a week's trial and numerous appeals thereafter. The

(Footnote continued on following page)

The claim that this case will expose state treasuries to plunder in every constitutional damage suit between an employee and citizens is patently ridiculous and ignores the unique nature of the case at bar.

If indeed, it is desirable to "curtail the explosion of §1983 cases", this action by any standard, is not equal to the task. This is a narrow case, severely limited in its possible application. The Commonwealth of Kentucky is liable for attorney's fees in this case because of the constitutional violations committed by its Commissioner of State Police and only then because the Commissioner of State Police in Kentucky is vested with unique policy making authority by the Kentucky State Legislature.

The state remains totally shielded from attorney's fee exposure in the vast majority of cases in which constitutional violations are committed by the rank and file of state employees.

Amici rely upon *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U. S. 719 (1980) and *Pulliam* v. *Allen,* ___ U. S. ___, 80 L. Ed

(Footnote continued from preceding page)

special prosecutor in this criminal action then brought a wrongful death civil damage suit against the Estate of Clyde Daniel Graham and subsequently amended the Complaint to interplead Buddy Graham as a defendant. Although the Complaint did not allege agency between Buddy and his son Clyde, did not allege that Buddy commanded the killing of Trooper Harris or knew of it, or could have prevented it, or profited from it in any way, the Amended Complaint withstood all motions to dismiss and also resulted in a week's trial. No part of the attorney's fees in the case at bar are as a result of any of the foregoing litigation. In any event no issue is raised in the case at bar that the attorney's fee is excessive.

2d 565, 104 S. Ct. ____ (1984) as authority for the proposition that liability for fees must depend upon merits liability.

In both cases relied upon by Amici, this Court was presented with significantly different facts than are presented by the case at bar. There, the Court was confronted with the peculiar problems raised by legislative and judicial immunity. Here the sole question to be decided upon is whether a *state* can be ordered to pay the legal fees incurred by a prevailing §1983 plaintiff. In *Hutto,* Footnote 31 at page 669, this Court confirmed that states were intended by Congress to be subject to attorney's fees awards:

> "The present Act, in contrast, has a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune from fee awards. Moreover, the Act is not part of an intricate regulatory scheme offering alternative methods of obtaining relief. If the Act does not impose liability for attorney's fees on the States, it has no meaning with respect to them."

The intent of Congress in enacting §1988 was to encourage the vindication of constitutional rights. Should this Court sustain the position of the Petitioner, a small but nonetheless important class of constitutional infringements would be effectively removed from the possibility of vindication.

It has been our experience that the vast majority of potential victims of police brutality are the poor and the underprivileged. Without the incentive of attorney's fee awards assessible against a financially responsible entity, many constitutional infringements will not be vindicated. We cannot believe Congress intended such a result.

CONCLUSION

If the Commonwealth of Kentucky is permitted to escape attorney's fee responsibility by the simple act of disavowing, after the fact, the actions of its own policy making State Police Commissioner, §1988 will be effectively destroyed in cases such as this one. Every state when faced with a factual situation remotely similar to the case at bar will be given a green light to thwart the objective of §1988 by simply firing or disavowing the policy making official involved.

In our view, the incentive of the states to monitor and supervise so as to avoid constitutional infringements will, at the very least, be greatly weakened.

For all of the foregoing reasons, we respectfully submit that the judgments of the United States District Court and the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CONCLUSIONS

After reviewing all of the information obtained during the investigation into the murder of Kentucky State Police Trooper Eddie Harris and the subsequent shooting death of Clyde Daniel Graham by Kentucky State Police Sgt. Eugene Coffey in Effingham, Illinois, the Office of the Attorney General concludes the following:

1. *The Death of Kentucky State Police Trooper Eddie Harris*

All of the available evidence overwhelmingly indicates that Clyde Daniel Graham shot and killed Kentucky State Police Trooper Eddie Harris without provocation.

2. *The November 7-8, 1979 Search of the Graham Residence by Law Enforcement Authorities*

a. The requisite leadership by the Elizabethtown Kentucky State Police command staff, from the post commander down, was lacking on the night of November 7, 1979. This lack of leadership resulted in confusion by state police personnel as to assignments and in the convergence of an excessive number of troopers at the Graham residence to participate in a search which rapidly became uncontrolled.

b. The evidence indicates that certain Kentucky State Police personnel used excessive force against James D. "Jimmy" Graham during the search of the Graham residence on the night of November 7, 1979.

It is noted that conflicting testimony concerning the use of excessive force in the arrest of James E. "Buddy" Graham, Charles McLain and James D. Graham on the night of November 7, 1979, at the Graham residence has been considered by two juries, one in the United States District Court in Louisville, Kentucky, during the trial of James

E. "Buddy" Graham on charges of harboring a fugitive, etc. and one in the trial of these three individuals in Hardin District Court on the charges of disorderly conduct and resisting arrest. The jury in the federal case acquitted James E. "Buddy" Graham on all charges, while the jury in the state case convicted James E. "Buddy" Graham and Charles McLain of disorderly conduct and resisting arrest, while acquitting James D. Graham of all charges. It is further noted that the law allows a defendant, when said defendant believes that such force is necessary to protect himself, to use physical force if the arresting officer is using more force than is reasonably necessary to effect the arrest. (See KRS 503.050(1); KRS 503.060(1) and Commentary).

Therefore, while there is some question raised as to whether excessive force was used in the arrest of James E. "Buddy" Graham and Charles McLain, there seemed to be no question in the mind of either jury concerning the use of excessive force in the arrest of James D. "Jimmy" Graham. No one interviewed admitted striking any of these individuals, other than the one blow struck by Trooper Harold Antle to Charles McLain, and no one interviewed identified anyone as striking any other blows.

c. The above actions by both the post command staff and certain individual state troopers demonstrated an obvious lack of professionalism on their part and a complete breakdown of the discipline demanded of such highly trained law enforcement officials. While the existence at that time of a highly charged, emotional atmosphere among members of the Kentucky State Police is certainly understandable because of the gruesome murder of their comrade, Trooper Eddie Harris, and their knowledge of the past criminal activities of some of the individuals involved, this cannot justify the unprofessional actions referred to above. Therefore, this report is being forwarded to the Secretary

of the Kentucky Department of Justice and the Commissioner of the Kentucky State Police for whatever action they deem appropriate to insure that such actions will not recur.

3. *The Death of Clyde Daniel Graham in Effingham, Illinois*

a. While questions can be raised concerning the appropriateness of the plan to effect the apprehension and arrest of Clyde Daniel Graham which was devised by Illinois and Kentucky officers on the night of December 7, 1979, this office cannot conclude that such a plan was an unreasonable one, when viewed from the standpoint of the circumstances involved at that time.

Certainly, hindsight tells us that there must have been a better way. However, at the time such plan was devised, the officers involved did not have the benefit of knowing what would happen. Public streets ran both in front of and in back of the Villa Inn Motel, and public safety had to be considered. At the same time, one can certainly perceive of plans to surround the room and call upon the suspect to come out or to use teargas and bullet-proof vests which had been called for.

While this office has its own doubts about the advisability of the decision which was made, in the end it was a judgment call to be made by those at the scene after considering all of the alternatives.

b. Nothing approaching a struggle occurred between Sgt. Eugene Coffey and Clyde Daniel Graham at the doorway to Room 7 of the Villa Inn Motel in Effingham, Illinois, immediately preceding the shooting of Clyde Daniel Graham; and Sgt. Coffey fired the shots that killed Clyde Daniel Graham before entering the room. None of the eyewitnesses to the event saw any struggle take place. Several witnesses testified that both shots were fired by Sgt. Coffey from outside of the room. Even Sgt. Coffey

indicated that he never really struggled with Graham, but "just barely got my hands on him and he backed away and continued reaching for his rear pocket". Whether Graham was indeed reaching for his rear pocket and whether Sgt Coffey was indeed in fear of his life are questions which apparently will never be answered.

c. There exists conflicting testimony as to what Kentucky State Police had been told and what they believed concerning whether Clyde Daniel Graham was heavily armed or not. We were unable to resolve these conflicts.

d. Sgt. Eugene Coffey shot Clyde Daniel Graham once in the front of the body and once in the back of the body. These shots occurred rapidly with little time lapse between them. This office concurs with the opinion of Dr. Frank Cleveland that in all likelihood, tthe first shot fired hit Clyde Daniel Graham in the front of the body at an angle as the body was beginning to turn and the scond shot entered the back of the body as Clyde Daniel Graham was falling forward away from the door. The short amount of time between the two shots, the fact that both shots were fired from outside the room and from approximately the same distance from the body and the angles of entrance and exit wounds all support such a conclusion as opposed to the possibility that the first shot entered the back of the body. (See Dr. Cleveland's Statement.)

While this conclusion does not necessarily rule out the possibility that Sgt. Coffey feared for his life when he fired these two shots, it certainly is in direct contradiction of his statement that he fired a shot into the front of Clyde Graham which did not knock him down and then fired another shot into the front of Graham, this time knocking Graham down.

4. *Procedures of Illinois Officials following the Death of Clyde Daniel Graham*

a. Some evidence at the scene of the shooting of Clyde Daniel Graham was not properly secured and maintained by Illinois authorities, to wit: The body was moved and the shirt the decedent was wearing at the time of the shooting disappeared.

b. The fact that Clyde Daniel Graham was shot once in the back of the body was so obvious that we must conclude that such fact was either deliberately concealed or not discovered as a result of gross incompetence by certain Illinois officials and by at least one Kentucky State Trooper.

Undoubtedly, Sgt. Coffey knew that one of the shots entered the back of Clyde Daniel Graham. In addition, it is the opinion of this office that Dr. Ernest G. Frank, the Effingham, Illinois pathologist who performed the post-mortem examination of Clyde Daniel Graham and Dr. R. R. Lystilla, then Coroner of Effingham, Illinois, who attended most of the examination, knew or should have known this fact at the time of said examination. Dr. Cleveland and Dr. Hamilton confirmed as much in their reports.

Furthermore, it is the opinion of this office that anyone who viewed the body of Clyde Daniel Graham either at the scene or later in any detail probably knew that one shot had entered the back of Clyde Daniel Graham. Even when an untrained eye views the pictures of the front and the back of the body, it is extremely difficult to reach any other conclusion.

As a result of the aforementioned conclusions, copies of this report are being forwarded to the Governor and the Attorney General of the State of Illinois, the Superintendent of the Illinois State Police, the Illinois Board of Medical Licensure, and the Kentucky Secretary of Justice for their review and consideration.

6. *Kentucky State Police Investigation*

a. An internal investigation into allegations of the use of excessive force by certain Kentucky State Troopers during the arrests of the three individuals on the night of November 7, 1979, should have been instituted immediately. Although such allegations came to light very shortly after the arrests, the decision was made to delay any review of these allegations until after certain civil rights complaints had been resolved by the federal government. Had such an internal investigation begun immediately, perhaps more definite answers could have been found concerning the events of the night of November 7, 1979.

It is our recommendation that it be mandatory procedure to immediately conduct investigations of allegations of misconduct by Kentucky State Police personnel whether formal complaints have been filed with the Kentucky State Police or any other agency.

b. The procedures for investigating complaints against Kentucky State Troopers which existed on November 7, 1979, were totally inadequate. It is the opinion of this office that the existence of a completely separate internal unit or a unit outside of the Kentucky State Police is imperative in order to investigate such complaints to the satisfaction of both complainants and the general public.

c. The investigation of this whole series of events by Lt. Larry Fentress under the direction of then Commissioner Kenneth Brandenburgh was cursory and incomplete, and points up the inherent problem of agency personnel investigating their own agency. However, based on our investigation, we conclude that neither former Commissioner Brandenburgh nor Lt. Fentress knew that Clyde Daniel Graham was shot once in the back until being shown the pictures indicating such by the staff of this office during our interviews with them.

CERTIFICATE OF SERVICE

I, Jack M. Lowery, Jr., Counsel for Respondents, hereby certify that the foregoing Brief for Respondents was served on Petitioner by depositing three copies of same in the United States mail, first class postage prepaid, this 27 day of March, 1985, addressed to:

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